ORIGINAL

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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

HOWARD RAY, CHARLES GALIPEAU and TROY ALEXANDER,

Petitioners,

vs.

JUDY GAIL IWANSKI, Personal Administrator of the Estate of DON DOUGLAS IWANSKI, deceased,

Respondent.

Case No. 99-1534

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

COMES NOW, the Respondent, by and through its attorney of record, Shannon Davis, and moves this Honorable Court for leave to proceed *In Forma Pauperis*. In support thereof, the Respondent alleges and states as follows:

1. This action was brought pursuant to 42 U.S.C. §§ 1983, 1988, seeking monetary damages for injuries suffered by Don Douglas Iwanski while a prisoner at Northeast Oklahoma Correctional Center, which ultimately resulted in his death.

2. Northeast Oklahoma Correctional Center is a minimum security prison operated under the direction and control of an agency of the State of Oklahoma, more particularly, the Department of Corrections.

3. The Estate of Don Douglas Iwanski, Deceased, is without any assets, and is therefore unable to pay the costs necessary to respond to the Petition herein.

4. The Estate of Don Douglas Iwanski, Deceased, has received no funds or income within the last twelve months.

5. The Estate of Don Douglas Iwanski, Deceased, has no cash or money in a checking or savings account.

6. The Estate of Don Douglas Iwanski, Deceased, owns no real estate, stocks, bonds, notes, automobiles or other valuable property.

7. The Estate of Don Douglas Iwanski, Deceased, has already incurred significant expenses related to this action.

8. The Estate of Don Douglas Iwanski, Deceased, is unable to pay the $600 - $800 cost of preparing a brief as required by Supreme Court Rule 33.

9. On June 9, 1998, the United States District Court for the Northern District of Oklahoma granted the Respondent leave to proceed *in forma pauperis* at the trial court level.

10. On July 15, 1998, the United States District Court for the Northern District of Oklahoma granted the Respondent leave to proceed *in forma pauperis* on appeal.

11. Respondent would further direct this Court's attention to the Affidavit of Shannon Davis, which is attached hereto and marked as Exhibit "A".

WHEREFORE, premises considered, Respondent respectfully prays this Honorable Court grant it leave to proceed *in forma pauperis*.

Respectfully Submitted,

Shannon Davis, OBA# 15752
406 S. Boulder, Suite 400
Tulsa, OK 74103
(918) 582-1124

STATE OF OKLAHOMA)
) **SS.**
COUNTY OF TULSA)

AFFIDAVIT

Your Affiant, Shannon Davis, being first duly sworn, on oath, states:

1. Your Affiant is the attorney representing the Estate of Don Douglas Iwanski, Deceased, in the District Court of Sequoyah County, State of Oklahoma, Case No. P-97-16. This Affidavit is made on your Affiant's personal knowledge.

2. As attorney for the Estate of Don Douglas Iwanski, Deceased, your Affiant has reviewed the financial accounts and assets of said Estate.

3. Don Douglas Iwanski died intestate on February 4, 1995. At the time of his death, he owned no property and had no financial accounts which could be used to pay the costs incurred in responding to the Petition filed in this action.

4. Your affiant has read the above Motion for Leave to Proceed *In Forma Pauperis*, and would state that all statements therein are true and correct to the best of your Affiant's knowledge and belief.

Further your affiant sayeth not.

Shannon Davis

Subscribed and sworn before me this 14th day of April, 2000.

Notary Public

My Commission Expires:

Exhibit "A"

99-1534

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HOWARD RAY, CHARLES GALIPEAU
AND TROY ALEXANDER,
Petitioners,

vs.

JUDY GAIL IWANSKI, PERSONAL
ADMINISTRATOR OF THE ESTATE OF
DON DOUGLAS IWANSKI, DECEASED
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Shannon Davis, OBA #15752
406 S. Boulder, Suite 400
Tulsa, OK 74103
(918) 528-1124
Attorney for Respondent

List of Parties

In addition to the parties listed by Petitioners, three additional parties warrant mention. Larry Fields, John Middleton and Randall Burke were defendants/appellees in the proceedings below. The claims against Fields, Middleton and Burke were dismissed by the District Court. The Tenth Circuit sustained the dismissal as to these parties.

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STATEMENT OF JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for certiorari only for compelling reasons. According to Rule 10, compelling reasons can be found, among other things, if the decision leading to the petition: is in conflict with a decision of another United States court of appeal on some important matter and/or state court of last resort; reflects a departure from the usual course of judicial proceedings; or, presents an important question of federal law that has not been but should be settled by this Court.

Petitioner have not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. Petitioners have not and cannot present any question which would show that the Tenth Circuit's decision is in conflict with the decision entered by another United States Court of Appeal, a decision by a State Court of last resort, or that the decision rendered departs from the accepted and usual course of judicial proceedings. Instead, Petitioners attempt to invoke this Court's authority by asking it to correct errors supposedly committed by the Tenth Circuit, and to overturn this Court's decision in *Farmer v. Brennan*, 511 U.S. 835 (1994). For the reasons explained below, the Tenth circuit did not commit any error when it held that there was sufficient evidence to warrant reversal of the district court's granting of the Petitioner's Motion for Summary Judgment.

STATEMENT OF THE CASE

I. Procedural History

1. This action was originally brought against six (6) Defendants. All Defendants below, including the three (3) Petitioners herein, filed a Motion for Summary Judgment in the District Court, contending that they did not violate Iwanski's Constitutional Rights and further

asserted that they were entitled to qualified immunity, claiming that there actions were "objectively reasonable".

2. The District Court granted the Motion for Summary Judgment, as to all Defendants, holding that their actions/inactions did not violate the Eighth Amendment and that the Defendants were further entitled to qualified immunity.

3. Respondent timely appealed the District Court's decision to the Tenth Circuit. After both parties fully briefed the matter, and after entertaining oral argument, the Tenth Circuit entered its unanimous opinion, affirming the dismissal of the claims against Larry Fields, John Middleton and Randall Burke, and further affirming the dismissal of Petitioner's claims which were based upon the inadequacy of medical care. However, the Tenth Circuit reversed the District Court's granting of summary judgment against the Petitioners herein, Howard Ray, Charles Galipeau and Troy Alexander on Respondent's claims of failing to protect. In so deciding, the Tenth Circuit held that Respondent's evidence raised a genuine issue of material fact as to whether certain prison officials were deliberately indifferent to the risk created by providing White access to a steel bed leg which he used as a weapon, and that a factual dispute remains whether these Defendants were deliberately indifferent to the risk posed to the inmates. Pet. App. at 10.

II. Statement of Facts

Petitioner's State of the Case includes numerous misstatement of fact. Respondent offers the following as a correct account of the facts in this case.

1. Judy Gail Iwanski was the mother Don Douglas Iwanski (hereinafter Iwanski), and was appointed as the personal representative of the Estate of Don Douglas Iwanski, deceased.

2. At the time this action arose, Iwanski and Kevin White were incarcerated with the Oklahoma Department of Corrections (DOC), housed at the Northeastern Oklahoma Correctional Center (NOCC).

3. On or about February 4, 1995, Kevin White assaulted Iwanski with a two foot long, four to five pound metal pipe while Iwanski's was asleep in his bunk at NOCC.

4. NOCC began operating in December, 1994. At the time of the assault, many areas of the facility were still under construction. As part of the construction and expansion, NOCC took over one floor of Adams Hall from Eastern State Hospital, which was adjacent to NOCC. Because the rooms at Adams Hall were larger than those previously used at NOCC, prison officials placed single beds into the rooms, unstacked. The two-foot long metal pipes previously used to stack the beds were placed into the closet of each of the inmates rooms, either by the Petitioners or at their direction. Kevin White used one of these pipes to kill Iwanski.

5. Judy Iwanski, as personal representative of the Estate of Don Douglas Iwanski, brought this action seeking monetary damages pursuant to 42 U.S.C. § for alleged violations of Iwanski's rights, pursuant to the Fourth, Eighth and Fourteenth Amendments to the United States Constitution.

6. On or about February 4, 1995, Howard Ray was Deputy Warden of NOCC and was responsible for the day-to-day operations of the facility, including security. His responsibilities included inspecting Adams Hall before inmates were moved in. He was aware of the need to restrict inmate's access to items such as construction materials.

7. On or about February 4, 1995, Troy Alexander was Unit Manager at NOCC, and was responsible for the overall operations of the Units in which both Kevin White and Don Iwanski

were housed. He was the officer responsible for preparing Adams Hall for inmates and he took no steps to ensure that the steel pipes generated from unstacking the beds were secured.

8. On or about February 4, 1995, Charles Galipeau was Chief of Security at NOCC. and responsible for the security of the facility and supervision of the security staff. He inspected the facility on a regular basis. He was aware of a problem with the correctional officers staying in their offices, and the fact that the inmates had access to weapons such as the one used to kill Iwanski.

9. At the time of the assault, DOC and NOCC had a policy prohibiting inmates from possessing weapons, consuming alcohol and gambling.

10. Supervision of the inmates at NOCC was extremely lax.

11. White ran weekly Friday night poker games while he was incarcerated at NOCC. The day before the assault White participated in a poker game in the unit day room and lost a significant amount of money because he was too drunk to play.

12. White began drinking vodka on January 30, 1995, the day he moved into Adams Hall, and remained drunk the entire week. At 2:00 p.m. the day of the assault, White was so drunk that you could smell the alcohol on him from 20 feet away.

13. During the time that White was playing poker, was fighting with other inmates and was visibly intoxicated, an NOCC policy required that inmates be counted on their bunks or at their assigned work area at 12:15 a.m., 1:00 a.m., 2:00 a.m., 3:00 a.m., 4:30 a.m., 7:30 a.m., 12:30 p.m., 4:30 p.m., 7:30 p.m. and 10:05 p.m.

14. On February 4, 1995, White took a steel bed leg from Adams Hall and boarded a bus to Building 14, the building in which Iwanski was housed. When he arrived at Building 14,

White walked past the officers on duty, beat Iwanski to death, and then walked past the officers off duty to exit the building.

15. Galipeau was aware that the correctional officers were not leaving their posts to watch the inmates.

16. The Petitioners recognized the danger of permitting inmates access to weapons and other materials such as steel pipes, and they were aware that White had access to steel pipes.

17. At the time of the assault, White was serving a sentence for assault and battery with a dangerous weapon after former conviction of a felony. He had already served a sentence for assault and battery upon a police officer. While in prison White had been assessed at least one misconduct point, which expired sixteen days before the assault on Iwanski.

18. NOCC'S "shakedown" policy does not state how many random shakedowns should be performed per day or per shift.

19. There were no requirements at NOCC as to how many walk-throughs should be performed per day or per shift.

20. On the day of the assault White had been involved in three separate fist fights with other inmates. At 3:00 a.m. he started a fight with one of his roommates. At 1:00 p.m. he was involved in another fight with a different inmate, which left him bleeding from the mouth and nose, and with obvious bruises on his face. At 4:00 p.m. White started another fight with his roommate.

SUMMARY OF ARGUMENT

Petitioners have failed to assert any proper reason for this Court to grant certiorari. The record below does not support the issues they have presented in their petition. At best, the petition asserts only that the Tenth Circuit misapplied the law as enunciated by this Court in *Farmer v.*

Brennan, 511 U.S. 825 (1994). This is simply not true. The Tenth Circuit's decision is well within the boundaries of *Farmer*. However, even if the Tenth Circuit did misapply *Farmer*, it properly stated the rule of law, and therefore, certiorari should not be granted. Sup. Ct. R. 10.

ARGUMENT

I. Neither The Record Nor The Decision Below Raise The Questions Presented By The Petition.

The case below, as it related to the Petitioners, involved two basic questions: (1) Whether there was a genuine issue of material fact regarding the Plaintiff's Eighth Amendment claims; and (2) Whether storing steel pipes in an inmate's room and inadequately supervising the inmates is, *per-se*, "objectively reasonable", thereby entitling the Petitioners to qualified immunity as a matter of law. The Tenth Circuit determined that there was a genuine issue of material fact regarding the Plaintiff's Eighth Amendment claims and that the Petitioners failed to prove that the storing of steel pipes in an inmate's room and inadequately supervising the inmate was "objectively reasonable". Pet. App. at 14, n. 2. None of the issues presented by Petitioner were raised, addressed or decided on at either the District Court or the Tenth Circuit, and therefore are not supported by the record, or the previous decisions.

II. The Tenth Circuit's Ruling Does Not Conflict With *Farmer v. Brennan*.

Petitioner represents that the Tenth Circuit misapplied this Court's decision in *Farmer v. Brennan*, 511 U.S. 825 (1994). Contrary to Petitioner's assertion that the "Tenth Circuit Court of Appeals has subjectively determined that all inmates in a prison are faced with risk of physical harm and as such, prison officials should be held responsible for any attack, even if there is no indication to any official that there is any risk to any inmate", the Tenth Circuit Court used the

appropriate standard in concluding that Respondent's evidence "raises a genuine issue of material fact as to whether certain prison officials were deliberately indifferent to the risk created by providing White access to a steel bed leg which he used as a weapon". Pet. App. at 10.

Farmer held that in order to find a prison official liable under the Eighth Amendment, it must be shown that the official acted with deliberate indifference. *Id.* at 834. The person must "consciously disregard" a substantial risk of serious harm. *Id.* at 837. Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence. *Id.* at 842.

Relying on *Farmer* the Tenth Circuit posed the question as whether Iwanski was incarcerated under conditions posing a substantial risk of serious harm and whether the prison officials subjectively knew of and disregarded that safety risk. Pet. App. at 6. It held that a jury could infer from the evidence that Ray, Galipeau and Alexander were aware of the steel pipes stored in the inmates rooms in Adams Hall (and the risk they caused), but did not take steps to secure them, and that these Defendants were responsible for ensuring the inmates were adequately supervised. Pet. App. at 13-14. This created a factual dispute as to whether the Defendants were deliberately indifferent to the risk posed to the inmates. Pet. App. at 14.

The Tenth Circuit then addressed the Petitioners' claims of qualified immunity. In order to utilize this defense, a defendant must show that their conduct was "objectively reasonable" in light of clearly established law. *Elder v. Holloway*, 510 U.S. 510, 512 (1994). The Tenth Circuit found that Ray, Galipeau and Alexander each either participated in, or acquiesced in, placing the pipes in inmate White's room, and that each was responsible for ensuring that the inmates were properly supervised. Pet. App. at 13. Based upon these facts, the Tenth Circuit could not find that the

Defendant's actions in storing steel pipes in an inmate's room and inadequately supervising the inmates was "objectively reasonable", and determined that Ray, Galipeau and Alexander should not have been granted qualified immunity. Pet. App. at 14.

The Tenth Circuit's decision was not nearly as broad as Petitioners would have this Court believe. Petitioners would have this Court believe that the Tenth Circuit held that prison officials are responsible under the Eighth Amendment for **all** inmate assaults. This is not how the Tenth Circuit ruled. The Circuit Court simply reviewed the evidence and drew reasonable inferences therefrom in the light most favorable to the Respondent, as required when ruling on a motion for summary judgment. Pet. App. at 3. Based upon that standard of review, the Tenth Circuit Court reviewed the entirety of the evidence presented to it, and based its decision on many facts in making its determination that a genuine issue of material fact exists, including but not limited to: (1) that White was predisposed to violence, Pet. App. at 6; (2) that Ray, Galipeau and Alexander each either participated in, or acquiesced in, placing the pipes in inmate White's room, and that each was responsible for ensuring that the inmates were properly supervised, Pet. App. at 13; (3) that prison officials recognized the danger of permitting inmates access to materials such as the pipe used to kill Iwanski, Pet. App. at 7; (4) that the policy of prohibiting inmates from possessing weapons demonstrated that the Petitioners recognized the danger of allowing prisoners access to weapons, even those incarcerated at minimum security facilities, Pet. App. at 7; (5) that supervision at NOCC was lax, Pet. App. at 7; (6) that supervision at NOCC was inadequate, Pet. App. at 8; and, (7) that White had been drinking vodka from January 30, 1995 until the day of the assault, Pet. App. at 7.[1]

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[1] Petitioners assert that the Tenth Circuit relied on information discovered by the DOC internal affairs staff after the incident to determine the reasonableness of the officers' actions before the assault. Pet. Br. at 10. However, Petitioners fail to state what this supposed evidence is.

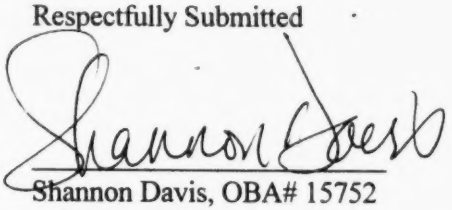
Based upon these facts, and others not cited herein, the Tenth Circuit determined that there was sufficient evidence for a jury to conclude that the Defendant's conduct was deliberately indifferent to the risk created by providing White access to a weapon, and that the Defendants' actions were not objectively reasonable. Pet. App. at 14.

There is simply no reason to grant certiorari in this case. Petitioners have failed to present anything which would show that the Tenth Circuit's decision is in conflict with any decision entered by another United States Court of Appeal or a decision by a State Court of last resort, or that the decision rendered departs from the accepted and usual course of judicial proceedings. Furthermore, the question of federal law herein has been previously settled by this Court's decision in *Farmer v. Brennan*. The Tenth Circuit's decision is in conformity with that decision .

CONCLUSION

This Court should deny certiorari to review the Tenth Circuit Court of Appeals' decision which concluded that Plaintiff's evidence raised a genuine issue of material fact as to whether prison official were deliberately indifferent to the risk posed to the inmates.

Respectfully Submitted



Shannon Davis, OBA# 15752
406 S. Boulder, Suite 400
Tulsa, OK 74103
(918) 582-1124